

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0399

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 7, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 123922). Claimant filed a timely request for hearing. On April 12, 2019, ALJ S. Lee conducted a hearing, and on April 22, 2019 issued Order No. 19-UI-128589, concluding claimant's discharge was not for misconduct. On April 24, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

Claimant's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond his reasonable control prevented him from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), only information received into evidence at the hearing was considered when reaching this decision.

FINDINGS OF FACT: (1) St. Charles Health System, Inc. employed claimant, last as the nuclear medicine coordinator in the radiology department, from June 11, 2017 to January 16, 2019.

(2) The employer prohibited employees from discarding radioactive materials in the trash, required nuclear technicians to check garbage containers for radioactive materials before the trash was emptied, and initial an electronic form stating they had done so. The employer also had a written policy that required a nuclear medicine technician to be present throughout the Y90 diagnostic procedure. The employer published policies to that effect, discussed them at meetings, and claimant understood them.

(3) On April 3, 2018, the employer gave claimant a warning for not setting a good example as a supervisor. Claimant had concerns about some decisions made within the department that he voiced after his supervisor made a decision; the supervisor considered claimant's concerns as complaints and thought he was demonstrating a negative attitude by not supporting decisions he disagreed with after they had been made. The employer was also concerned that claimant left work early on five occasions despite not having completed certain training. Claimant did not think he had been negative, and thought he had done work behind the scenes that was not recognized.

(4) On April 18, 2018, someone entered claimant's initials on the electronic form stating that a nuclear technician had inspected the garbage for radioactive materials. Claimant had not checked the garbage or entered his initials on the form. The employer concluded claimant was responsible for the incident because his initials were on the form, and issued him a written warning.

(5) On December 20, 2018, claimant delivered radioactive materials to a physician for a Y90 procedure and then left the room rather than staying for the procedure as the employer's policy required. Claimant was short-staffed that day, felt he was urgently needed elsewhere, and thought that because the physician in the room was authorized to handle radioactive material that he would not be needed during the procedure. The employer suspended claimant for leaving the room during the Y90 procedure.

(6) On January 16, 2019, the employer discharged claimant because of his December 20th policy violation.

CONCLUSIONS AND REASONS: The employer discharged claimant, but not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. OAR 471-030-0038(3)(a) (December 23, 2018) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee. Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b).

The employer had a policy requiring claimant to remain in the room during Y90 procedures, and claimant understood that policy. Notwithstanding, claimant left the room during the December 20th Y90 procedure. Although in his exercise of judgment he thought that leaving the room was his best course of action and in the employer's best interests, his decision still violated the employer's policy. Claimant was conscious of his conduct, knew or should have known it would probably violate the employer's policy, and demonstrated indifference to the consequences of his conduct by choosing to leave anyway. His conduct therefore was wantonly negligent.

Wantonly negligent conduct is not misconduct, however, if it is excusable as an isolated instance of poor judgment. To determine whether conduct was an isolated instance of poor judgment, the following standards apply:

(A) The act must be isolated. The exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior.

(B) The act must involve judgment. A judgment is an evaluation resulting from discernment and comparison. Every conscious decision to take an action (to act or not to

act) in the context of an employment relationship is a judgment for purposes of OAR 471-030-0038(3).

(C) The act must involve poor judgment. A decision to willfully violate an employer's reasonable standard of behavior is poor judgment. A conscious decision to take action that results in a wantonly negligent violation of an employer's reasonable standard of behavior is poor judgment. A conscious decision not to comply with an unreasonable employer policy is not misconduct.

(D) Acts that violate the law, acts that are tantamount to unlawful conduct, acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3).

See OAR 471-030-0038(1)(d). In this case, claimant's conduct was isolated. The record shows that he exercised poor judgment when he failed to remain in the room throughout a Y90 procedure on only one occasion. Although he had two prior warnings, they were for dissimilar conduct that occurred eight months prior to the final incident, suggesting that the December 20th incident was not repeated or part of a pattern of other conduct. Nor were the two prior warnings the result of willful or wantonly negligent conduct since the record does not show that claimant more likely than not intentionally or consciously set a poor example as a supervisor, nor does it show that claimant was more likely than not responsible for failing to identify radioactive material in the trash or initialing the electronic form suggesting that he had ensured the trash was free of radioactive material. Claimant's December 20th conduct was isolated.

Claimant's wantonly negligent exercise of poor judgment on December 20th also did not exceed mere poor judgment. The record does not show that claimant was required by law to remain in the room during the Y90 procedure, so his conduct was not unlawful or tantamount to unlawful conduct. Although claimant violated the employer's policy, there are several factors that mitigate his exercise of poor judgment. For instance, when claimant left the room he left the radioactive material in the hands of someone authorized to handle it. He was understaffed that day, and, in his judgment, thought that he was more urgently needed elsewhere. Although the employer clearly disagreed with claimant's decision to leave, and his assessment of his priorities, claimant was attempting to balance competing duties and act in the employer's interests. Objectively, other employers are likely to have continued to trust an individual who tried but failed to act in its best interests, and, rather than discharging the individual, continued to employ him and avoid future incidents by, for instance, educating claimant about how to handle being short-staffed, or which duties to prioritize when short-staffed. Claimant's conduct therefore did not cause an irreparable breach of trust or make a continued employment relationship impossible.

The employer discharged claimant for an isolated instance of poor judgment. Because isolated instances of poor judgment are not misconduct, claimant's discharge was not for misconduct, and claimant is not disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Order No. 19-UI-128589 is affirmed.

J. S. Cromwell and S. Alba;
D. P. Hettle, not participating.

DATE of Service: May 29, 2019

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyon.

Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Asuntos Laborales. Si no está de acuerdo con esta decisión, puede presentar una Petición de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄໍາຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄໍາຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນໍາຄໍາຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄໍາຮ້ອງຂໍການທົບທວນຄໍາຕັດສິນນໍາສານອຸທອນລັດ Oregon ໄດ້ ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الاستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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